
SUPREME COURT OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	Cass County Case No.
)	09-2019-CR-4757
Plaintiff/Appellee,)	
)	Supreme Court Case No.
v.)	20200179
)	
Michael Lee Stands,)	
)	APPELLANT’S BRIEF
Defendant/Appellant.)	

**Appeal from the Amended Judgment entered June 22,
2020 in Cass County district court, east central judicial
district, North Dakota, the Honorable Steven E.
McCullough presiding.**

**APPELLANT’S BRIEF
ORAL ARGUMENT REQUESTED**

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

Transcript References:

A motion hearing was held on February 4, 2020. The transcript of that hearing is referred to as [Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Michael Stands, timely appealed the district court's final criminal judgment. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI, § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court erred by denying Mr. Stands' motion to suppress evidence.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from East Central Judicial District, Cass County Criminal Judgment. This case was before the district court in *State v. Stands*, 9-2019-CR-04757. The criminal information was filed with the court on November 6, 2019. Mr. Stands was charged with Possession of Methamphetamine with Intent to Deliver, in violation of

N.D.C.C. § 19-03.1-23(1), a class A Felony and Possession of Drug Paraphernalia, specifically a scale for use with methamphetamine, in violation of N.D.C.C. § 19-03.4-03(1), a class C Felony. Mr. Stands was appointed Attorney Charles Sheeley to represent him on November 25, 2019.

[¶ 4] Mr. Sands' waived his preliminary hearing and entered not guilty pleas on December 5, 2020. A motion to suppress was held on February 4, 2020. On February 12, 2020, the motion was denied. Mr. Stands ultimately made conditional pleas of guilty. As a result of his pleas, the final amended criminal judgment was entered in this case on June 23, 2020. Mr. Stands reserved the right to appeal the district court's order on his pretrial motion to suppress evidence gathered from an extended seizure, warrantless, and nonconsensual search by law enforcement. Mr. Stands timely appealed the district court's denial of his motion to suppress.

STATEMENT OF FACTS

[¶ 5] Officer Witzel testified she observed a blue Ford pickup going west on 9th Avenue South at 7:15 a.m. on November 5, 2019. Tr. p. 5. She testified the truck failed to stop at a stop sign. *Id.* She began to follow the vehicle and eventually activated her overhead lights. *Id.* The truck pulled over in a parking lot at 1825 42nd Street South. *Id.*

[¶ 6] The Officer saw Mr. Stands exit the truck and he was standing behind it. *Id.* p. 6. Mr. Stands told the officer he did not have identification on him but gave his name and date of birth. *Id.* pp. 5, 7, 12. Officer Witzel

testified that her department's policy is to cite drivers for driving under suspension but not to arrest them, unless it is their fourth offense or greater. Tr. pp. 14-15. After Mr. Stands gave Officer Witzel his information she went back to her car to run his name and date of birth. She also called for a canine unit to come to the scene but was told one was not currently available. Tr. p. 15, 16. The Officer was told through dispatch Mr. Stands did not have any warrants and she reproached him.

[¶ 7] Officer Witzel testified she was alone on the stop, so she asked Mr. Stands to move to the rear of her vehicle. *Id.* p. 6. She then asked if he had anything on him. *Id.* Mr. Stands responded that he did not have anything on him. The Officer asked to search Mr. Stands. Mr. Stands complied with the search of his person by putting his hands up and away from his body. *Id.* p. 7. The Officer testified he kind of shrugged and put his hands up. *Id.* p. 18 ln 14-16. She had initially testified that he gave a verbal assent but after the video of the encounter was played, she testified that no response was audible. *Id.* p. 18.

[¶ 8] Officer Witzel testified she saw what she believed to be a scale in Mr. Stands' pocket when he raised his arms to comply with her search. *Id.* p. 8. She searched Mr. Stands and found the scale, an unused pipe, and a large amount of cash. *Id.* pp. 8, 9. Officer Witzel indicated that Mr. Stands had been seized at the point in the encounter. Fifteen to twenty minutes into the stop Officer Witzel was contacted by dispatch to tell her canine handler

Detective Witte would be able to come to the stop. *Id.* p. 20. Officer Witzel testified neither the scale nor the pipe she located felt like a weapon. *Id.* p. 21. The canine eventually came to the stop and positively indicated on Mr. Stands truck. A search was then conducted of the vehicle and methamphetamine was found.

LAW AND ARGUMENT

I. Whether the district court erred by denying Mr. Stands' motion to suppress evidence.

Standard of Review

[¶ 9] For a motion to suppress, the Court gives deference to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. *State v. Tognotti*, 2003 ND 99, ¶ 5, 663 N.W.2d 642. The district court will be reversed upon showing there was not "sufficient competent evidence capable of supporting the court's findings, and if the decision is not contrary to the manifest weight of the evidence." *State v. Gefroh*, 2011 ND 153, ¶ 7; 801 N.W.2d 429. However, a question of law is fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law. *Id.*

[¶ 10] The Fourth Amendment of the United States Constitution and Article 1, § 8, of the North Dakota Constitution protect individuals from unreasonable governmental searches and seizures. *State v. Gregg*, 2000 ND 154, ¶ 22, 615 N.W.2d 515. For a search to be reasonable under the Fourth Amendment, a warrant is required, unless an exception to the warrant

requirement applies. *State v. Genre*, 2006 ND 77, ¶ 17, 712 N.W.2d 624 (N.D. 2006). It is the State’s burden to show that an exception to the search warrant requirement applies. *State v. Mitzel*, 2004 ND 157, ¶ 12, 685 N.W.2d 120 (N.D. 2004). Consent is an exception to the warrant requirement. *State v. Uran*, 2008 ND 223, ¶ 6, 758 N.W.2d 727 (N.D. 2008).

An Unlawful Extension of Mr. Stands’ Seizure

[¶ 11] “Traffic violations justify a stop by police officers.” *State v. Deviley*, 2011 ND 182, ¶ 9, 803 N.W.2d 561. When an officer seizes an individual for a traffic violation, it “justifies a police investigation of that violation.” *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). Because a routine traffic stop is relatively brief, it is more like a “Terry stop” than an arrest. *Rodriguez*, at 1614. A stop must not extend longer than the amount of time necessary to effectuate the purpose of the traffic stop. *State v. Phelps*, 2017 ND 141, ¶ 10, 896 N.W.2d 245.

[¶ 12] Officer Witzel directed Mr. Stands to move away from his truck to the back of her vehicle. She testified that she was alone on the stop, indicating this was for safety concerns. Officer Witzel testified she asked Mr. Stands if he had anything on him. If this question was unrelated to potential weapons it was an impermissible extension of the traffic stop. The Officer’s mission was to write a citation for failure to stop at a stop sign and potentially to cite Mr. Stands for driving under suspension. Neither of these two investigations would require questioning about any type of contraband.

Unrelated questions are permitted during a stop as long as they do not prolong the stop and extend the time the individual is detained. *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009). However that question, if it was about contraband as the State now argues, was not related to the stop and obviously prolonged the stop as the Officer was not writing up any type of citation during the questioning. Continuing to detain Mr. Stands to ask him questions unrelated to the traffic stop while not simultaneously working on the citation objectively lengthened the encounter between Mr. Stands and the Officer.

[¶ 13] In *Phelps* this Court advised what duties may be within the scope of a traffic related stop aside from issuing a citation. They were:

[R]equesting the driver's license and registration, requesting that the driver step out of the vehicle, requesting that the driver wait in the patrol car, conducting computer inquiries to determine the validity of the license and registration, conducting computer searches to investigate the driver's criminal history and to determine if the driver has outstanding warrants, and making inquiries as to the motorist's destination and purpose.

State v. Phelps, 2017 ND 141, ¶ 10, 896 N.W.2d 245. All of this information had already been obtained. The only thing left was to write the citations the Officer indicated she would be issuing.

Therefore Mr. Stands was being illegally detained for an unrelated investigation. Alternatively, Officer Witzel was conducting a pat-down search for weapons.

Consent to Search

[¶ 14] Mr. Stands never gave Officer Witzel clear consent to search, but simply complied with the Officer's obvious desire to search him for a weapon. Generally, the search inside of Mr. Stands' pockets would be illegal unless there was some indication that Mr. Stands had a weapon. Consent is a question of fact based on the totality of the circumstances. *United States v. Patachia*, 602 F.2d 218, 219 (9th Cir. 1979); *United States v. Miller*, 589 F.2d 1117, 1130 (1st Cir. 1978). The scope of an individual's consent is measured objectively by what a reasonable person would have understood by the exchange between an officer and the defendant. *State v. Guthmiller*, 2004 ND 100, ¶ 5, 680 N.W.2d 235. A law enforcement officer may conduct a frisk or a pat-down search of a person only when the officer has a reasonable and articulable suspicion that the individual is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). A pat-down search is justified only for the protection of the police officer or others nearby. *Id.* at 29. A pat down search has a limited scope; the protection of police officers. *State v Harlan*, 2008 ND 220, ¶11; 758 N.W.2d 706. The search of a detainee's pockets, if a pat-down search did not reveal any indication of a weapon or anything similar is an unjustifiable search. *Id.* In the present case, Officer Witzel testified that she asked if Mr. Stands had anything on him and Mr. Stands responded no. She also testified that she was alone on the stop and that is why she asked him to move towards her vehicle before asking about what he had on him. Based upon her own testimony the objective understanding of the question do you

have anything on you was to inquire about weapons. Furthermore, if the question was unrelated to weapons it would have been an impermissible delaying tactic, or extended seizure, used to continue to detain Mr. Stands until a canine was available. At the time the Officer asked the question about having anything on him, Mr. Stands was being detained for a traffic violation and to cite for a possible driving under suspension. There was no testimony presented that the officer had any reasonable articulable suspicion drug activity was present.

[¶ 15] Directly after Mr. Stands said he did not have anything on him the Officer asked to search him. Mr. Stands shrugged, put his hands up and placed his arms out. The objectively reasonable understanding by that exchange between the Officer and Mr. Stands was that she was concerned he had a weapon on him because she was alone on the stop. Mr. Stands believed she was looking for a weapon. Mr. Stands did not consent to the search simply because he put his arms up for a pat down search. “Mere acquiescence to police authority is insufficient to show consent.” *State v. Mitzel*, 685 N.W.2d 120, 125 (N.D. 2004). The question itself was ambiguous, “do you have anything on you” in the context of a police encounter for a driving violation objectively relates to weapons. If the question related to drugs the State had an opportunity to make that clear at the motion hearing. It is the State’s burden to provide “clear and positive testimony” to prove consent not mere acquiescence to police authority. The State failed to provide that

testimony and the district court erred by finding Mr. Stands gave consent to a search of his person. As a result, the search conducted was outside the scope of a *Terry* stop.

Clear and Positive Testimony

[¶ 16] Even if this Court finds there was enough “clear and positive testimony” to prove consent, as the district court found in paragraph two of its Order, the scope was limited to a weapons pat-down. *State v. Mitzel*, 685 N.W.2d 120, 125 (N.D. 2004). Mr. Stands clearly put his arms up and away from his body to show the officer he was not a threat and was not reaching for any type of weapon. That was the objectively reasonable understanding of why the Officer would be searching Mr. Stands’ clothing for a driving under suspension investigation. The State had an opportunity to illicit any reasonable articulable suspicion as to why Officer Witzel believed Mr. Stands had drug contraband on his person rather than a weapon, and they did not provide that information.

[¶ 17] Because Officer Witzel did not believe what she knew to be a scale or what she felt was a pipe were weapons, reaching inside Mr. Stands’ pockets was outside the scope of any consent he may have given. This Court in *Harlan* found a police officer’s search of Harlan’s pockets, after a pat-down search of her outer clothing, did not reveal anything that might feel like a weapon was an impermissible search. The case before the Court is similar, because the Officer knew she did not have consent for a search beyond a

weapons check, therefore the search was illegal. In keeping with this Court's previous holding, Officer Witzel conducted an illegal search of Mr. Stands and the evidence should be suppressed.

A Dog Sniff

[¶ 18] Generally, evidence unlawfully seized in violation of the Fourth Amendment must be suppressed under the exclusionary rule. *State v. Utvik*, 2004 ND 36, ¶ 26, 675 N.W.2d 387 (N.D. 2004). "Any evidence obtained as a result of illegally acquired evidence must [also] be suppressed as 'fruit of the poisonous tree'...." *State v. Gregg*, 2000 ND 154, ¶ 39, 615 N.W.2d 515 (N.D. 2000). Mr. Stands was illegally seized, searched without consent, or in the alternative beyond the scope of his consent, and detained for a half an hour for a canine unit to be available. The prolonged detention of Mr. Stands was unconstitutional, and this Court should suppress any evidence found as a result of that illegal seizure.

CONCLUSION

[¶ 19] The district court improperly denied a motion to suppress evidence by finding Officer Witzel did not conduct an illegal search of Mr. Stands within the context of the Fourth Amendment and Article 1, § 8 of the North Dakota Constitution. Any evidence obtained due to that unlawful search should be suppressed as fruits of the poisonous tree.

[¶ 20] WHEREFORE the Defendant respectfully requests the Court to reverse the district court's order denying his motion to suppress all evidence resulting from government's illegal search.

Dated this 6th day of October, 2020

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)	
Michael Lee Stands,)	
)	CERTIFICATE OF COMPLIANCE
Defendant/Appellant.)	

[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: October 6, 2020.

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Defendant/Appellant.)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix
Certificate of Compliance

And that said copies were served upon:

Derek Steiner, Asst. State's Attorney, sa-defense-notices@casscountynd.gov

by uploading said documents to the Supreme Court portal and upon appellant at:

Michael Stands, c/o Cass County Jail, 450 34 St S, Fargo, ND 58103

by placing a true and correct copy of said documents in a sealed envelope with USPS.

Dated: October 6, 2020.

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